A

PP v. BILLION NOVA SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
VARGHESE GEORGE JCA
IDRUS HARUN JCA
B [CRIMINAL APPEAL NO: Q-09-305-10-2014]
13 JANUARY 2016

C ***CRIMINAL PROCEDURE:*** *Forfeiture – Customs and excise – Application under s. 56(1) of Anti-Money Laundering and Anti-Terrorism Financing Act 2001 – Forfeiture of money – Whether conditions for exercise of power by Public Prosecutor fulfilled – Whether offence under s. 135(1)(g) of Customs Act 1967 proven*

D ***CRIMINAL PROCEDURE:*** *Forfeiture – Customs and excise – Application under s. 56(1) of Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLATFA') – Forfeiture of money allegedly related to customs offences – Standard of proof – Whether on balance of probabilities – Whether sales of cigarettes in principal customs area or offence under s. 4(1) AMLATFA proven – Whether predicate offence under s. 135(1)(g) of Customs Act 1967 proven – Whether proof of payments from principal customs area sufficient to prove predicate offence*

E ***CRIMINAL LAW:*** *Money laundering – Forfeiture – Allegation of sale transaction of duty free cigarettes in 'principle customs area' – Whether respondents committed offence under s. 135(1)(g) of Customs Act 1967 – Whether sums seized proceeds of unlawful activities – Whether prosecution established case*

F The first respondent's business activities involved import and export of beers, liquor and cigarettes in Labuan, which was a duty free zone and by virtue of s. 154 of the Customs Act 1967 ('Customs Act'), is not in the principal customs area. Under s. 154 of the Customs Act, 'principal customs area' means Malaysia with the exclusion of Labuan, Langkawi and Pulau Tioman. Any dutiable goods such as cigarettes while in Labuan are deemed
G non-dutiable goods by virtue of s. 158 of the Customs Act. As such, the cigarettes are allowed to be sold in Labuan only and can be exported from Labuan. On 21 September 2012, the appellant (the Public Prosecutor), by order issued pursuant to s. 50(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLATFA') directed the seizure of
H various sums of money in the respondents' 24 bank accounts. The appellant was satisfied that the sums seized were related to an offence of money laundering and more specifically, the offence of engaging in a transaction that involved proceeds of an unlawful activity under s. 4(1)(a) of the AMLATFA. However, the appellant did not institute any prosecution against the respondents for the said offence of money laundering, preferring instead to
I proceed with the application under s. 56(1) of the AMLATFA seeking the forfeiture of the sums seized. The appellant's application was premised on the allegation that the first respondent sold duty free cigarettes to buyers

where the transactions did not occur in Labuan. Instead, the transactions were allegedly carried out in Miri and Kota Kinabalu. It was contended that since no export duty was paid, the first respondent had committed an offence of knowingly concerned in a fraudulent evasion of customs duty under s. 135(1)(g) of the Customs Act. The appellant sought to prove that payments were made to the first respondent's account in Labuan by way of cash deposits from two locations in Miri and Kota Kinabalu and subsequently, various sums of money were transferred from the first respondent's account in Labuan to bank accounts belonging to the second, third, fourth and fifth respondents. As the offence under s. 135(1)(g) of the Customs Act is specified as a serious offence in the Second Schedule of the AMLATFA, the respondents were said to have committed an offence of money laundering under s. 4(1)(a) thereof. The High Court dismissed the appellant's notice of motion and hence, this appeal. The issue for the court's determination in this appeal was whether the sums seized were proceeds of unlawful activities from the sales of 'Malaysia Duty Not Paid' cigarettes allegedly transacted outside Labuan and thus could be forfeited under s. 56(1) of the AMLATFA.

Held (dismissing appeal with no order as to costs)
Per Idrus Harun JCA delivering the judgment of the court:

(1) Section 56(1) of the AMLATFA, under which the application for the forfeiture of the respondents' monies in various bank accounts was made, deals with the power of the Public Prosecutor to apply for forfeiture of property in respect of which there is no prosecution for an offence under s. 4(1) of the AMLATFA and the power of a judge of the High Court to make an order for the forfeiture of such property. The condition for the exercise of the Public Prosecutor's power under s. 56(1) had been fulfilled by the appellant *ie*, the monies in various bank accounts of the respondents were shown to have been seized by the appellant pursuant to s. 50(1) of the AMLATFA and the respondents were not prosecuted for the offence under s. 4(1)(a) of the AMLATFA. Further, the application was made within the time frame specified under s. 56(1). (paras 12, 14 & 15)

(2) The appellant sought to show 82 payments made into the first respondent's Labuan account by way of cash deposits, allegedly in connection with the sales of duty free cigarettes outside Labuan, *ie*, in Miri and Kota Kinabalu. While the documentary exhibits merely showed cigarettes sales apart from describing numerous other transactions, the appellant failed to show evidence that the sale transactions occurred in Miri and Kota Kinabalu. In the absence of such evidence, it could be reasonably inferred that the sale transactions had taken place in Labuan. (paras 24 & 28)

(3) Save for the mere averment on the 82 cash deposits, the appellant failed to prove that the remaining cash deposits were actually in respect of the cash sales of duty free cigarettes. The entries in the Labuan account merely indicated payments from Miri and Kota Kinabalu. Standing on its own, the entries in the Labuan account, without proof of corresponding entries in the standard ledger book, did not show that the cash deposits were indeed in respect of the cash sales for cigarettes. Even assuming that the 82 cash deposits were stated as cash sales for cigarettes in the standard ledger book, it was still insufficient to prove that the cigarettes were sold in Miri and Kota Kinabalu in the absence of any evidence of such sale transactions in both locations. (paras 27 & 30)

(4) The evidence led by the appellant clearly left a serious gap in the appellant's case when considered in light of the mandatory requirements under s. 56 of the AMLATFA. The appellant did not adduce any evidence that the cigarettes were transported and sold in Miri and Kota Kinabalu, being in the principal customs area, before it could be said that customs duty was payable by virtue of s. 155(1)(c) of the Customs Act and that, as it had not been paid, the respondents had committed the offence under s. 135(1)(g) of the Customs Act, and hence the offence of money laundering under s. 4(1) of the AMLATFA. (para 32)

(5) The appellant's investigation confirmed the respondent's assertion that they sold duty free cigarettes in Labuan and Langkawi. The appellant also did not refer to any provisions in the Customs Act and regulations made thereunder or any other law that duty free cigarettes sold in Labuan must be paid in Labuan or could not be paid in Miri and Kota Kinabalu or elsewhere. The appellant also sought to prove that cash payment made by one individual from Brunei was in respect of the cigarettes sale in Miri. Under s. 155(1)(b), export duty should not be payable for cigarettes exported from Labuan to Brunei. The appellant did not establish that the duty free cigarettes from Labuan was sold in or smuggled to the principal customs area and neither was it disproved that the cigarettes were not exported to Brunei. Accordingly, the cigarettes were exported from Labuan to Brunei and sold in Brunei because it was paid for by a person from Brunei and accordingly, export duty was not payable for the cigarettes exported from Labuan to Brunei. (para 33) (paras 34 & 35)

(6) Although the appellant sought to show that there were several other cash deposits made through Public Bank in Miri into the Labuan account, the appellant could only show one cash deposit which came from the cigarettes sale. There was no evidence regarding the other deposits to indicate that it came from cigarettes sale transactions. In the absence of any evidence to show that the cigarettes sale transactions occurred in Miri, the deposit was not the proceeds of cigarettes sales which were transacted in Miri. The appellant also sought to forfeit the sums seized

from the 23 bank accounts of the third, fourth and fifth respondents. However, there was no evidence to show that the sums were the proceeds of sales of cigarettes, or the purpose for which the appellant adduced the facts relating to the payments. (paras 38, 40, 41 & 42)

(7) The sum of RM195,573.67 in the Labuan account, which was sought to be forfeited by the appellant, was seized pursuant to an order under s. 50(1) of the AMLATFA on 21 September 2012. However, the appellant did not exhibit any bank statement or document nor produced any evidence to establish that that the sum was in fact in the Labuan account as at 21 September 2012 which could be seized or could be forfeited. The appellant also did not explain why the fifth respondent's bank account was included in the order and the connection between the two accounts which the appellant had seized. Further, the appellant, in seeking to forfeit the sum from the third respondent's account, failed to explain whether there was any connection between the Labuan account and the third respondent's bank account as both accounts contained exactly the same sum of RM195,573.67. No bank statements were exhibited to establish that the sum was in the two bank accounts and whether it was two different sums. (paras 43, 44 & 45)

(8) There was not an iota of evidence that the second respondent was involved in selling duty free cigarettes outside Labuan or that he was involved in money laundering activity. There was no explanation why the second respondent was included in this application. The notice of motion did not seek the forfeiture of his money or bank account. Hence, there was no basis for the second respondent to be included in this application and the appellant's application against him ought to be struck out. (para 47)

(9) In requiring the appellant to prove that money laundering offence had been committed or the evidence of cigarettes sale occurred outside Labuan, the trial judge had not applied criminal standard of proof. The appellant had to prove their case only on a balance of probabilities. The standard of proof, for the purpose of the application under s. 56(1) of the AMLATFA, requires evidence of sales of cigarettes in the principal customs area, or proof of offence under s. 4(1) of the AMLATFA. In order to prove the offence under s. 4(1), the predicate offence under s. 135(1)(g) of the Customs Act must first be proved. Mere proof of payments from the principal customs area without more was not sufficient to prove the predicate offence under s. 135(1)(g) of the Customs Act, hence, the offence under s. 4(1) of the AMLATFA. Since the offence was not proved, the forfeiture of the money seized by the appellant cannot be countenanced by the court. (paras 49 & 50)

Bahasa Malaysia *Headnotes*

Kegiatan perniagaan responden pertama melibatkan import dan eksport bir, minuman keras dan rokok di Labuan yang merupakan zon bebas duti dan menurut s. 154 Akta Kastam 1967 ('Akta Kastam') bukan dalam kawasan utama kastam. Di bawah s. 154 Akta Kastam, 'kawasan utama kastam' merangkumi Malaysia dengan pengecualian terhadap Labuan, Langkawi dan Pulau Tioman. Apa-apa barangan yang boleh dikenakan duti seperti rokok, ketika di Labuan, dianggap barangan yang tidak perlu dikenakan duti menurut s. 158 Akta Kastam. Oleh itu, rokok dibenarkan dijual hanya di Labuan dan boleh dieksport dari Labuan. Pada 21 September 2012, perayu (Pendakwa Raya), dengan perintah yang dikeluarkan di bawah s. 50(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 ('AMLATFA'), mengarahkan rampasan pelbagai jumlah wang dalam 24 akaun bank responden-responden. Perayu berpuas hati bahawa jumlah wang yang dirampas berkait dengan satu kesalahan pengubahan wang haram dan khususnya kesalahan melibatkan diri dalam transaksi yang melibatkan hasil aktiviti haram di bawah s. 4(1)(a) AMLATFA. Walau bagaimanapun, perayu tidak memulakan apa-apa pendakwaan terhadap responden-responden bagi kesalahan pengubahan wang haram tersebut sebaliknya meneruskan permohonan di bawah s. 56(1) AMLATFA bagi penyitaan jumlah wang yang dirampas. Permohonan perayu berdasarkan dakwaan bahawa responden pertama menjual rokok bebas duti kepada pembeli-pembeli di mana transaksi tidak berlaku di Labuan. Sebaliknya, transaksi didakwa berlaku di Miri dan Kota Kinabalu. Ditegaskan bahawa memandangkan tiada duti eksport dibayar, responden pertama melakukan satu kesalahan dengan sengaja berkaitan dengan pelanggaran frod duti kastam di bawah s. 135(1)(g) Akta Kastam. Perayu cuba membuktikan bahawa pembayaran dibuat ke dalam akaun responden pertama di Labuan melalui deposit tunai dari dua lokasi di Miri dan Kota Kinabalu dan seterusnya pelbagai jumlah wang dipindahkan dari akaun responden pertama di Labuan ke akaun-akaun bank kepunyaan responden kedua, ketiga, keempat dan kelima. Memandangkan kesalahan di bawah s. 135(1)(g) Akta 235 dianggap kesalahan serius dalam Jadual Kedua AMLATFA, responden-responden dikatakan melakukan kesalahan pengubahan wang haram di bawah s. 4(1)(a). Mahkamah Tinggi menolak notis usul perayu dan oleh itu, rayuan ini. Isu untuk penentuan mahkamah dalam rayuan ini adalah sama ada jumlah wang yang dirampas adalah hasil aktiviti haram penjualan rokok 'Malaysia Duty Not Paid' yang didakwa ditransaksikan di luar Labuan dan dengan itu boleh disita di bawah s. 56(1) AMLATFA.

Diputuskan (menolak rayuan tanpa perintah kos)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 56(1) AMLATFA, di mana permohonan bagi pelucuthakkan wang responden-responden dalam pelbagai akaun bank dibuat, adalah berkenaan kuasa Pendakwa Raya memohon penyitaan harta di mana tiada dakwaan terhadap kesalahan di bawah s. 4(1) AMLATFA dan kuasa Hakim Mahkamah Tinggi untuk membuat perintah bagi penyitaan harta tersebut. Syarat pelaksanaan kuasa Pendakwa Raya di bawah s. 56(1) telah dipenuhi oleh perayu iaitu wang dalam pelbagai akaun bank responden-responden dilihat telah dirampas oleh perayu menurut s. 50(1) AMLATFA dan responden-responden tidak didakwa dengan kesalahan di bawah s. 4(1)(a) AMLATFA. Malah, permohonan dibuat dalam tempoh masa yang dinyatakan di bawah s. 56(1).

(2) Perayu cuba menunjukkan 82 pembayaran dibuat ke dalam akaun Labuan responden pertama melalui deposit tunai yang didakwa berkaitan dengan jualan rokok bebas duti di luar Labuan iaitu di Miri dan Kota Kinabalu. Walaupun ekshibit dokumentar hanya menunjukkan jualan rokok selain daripada menghuraikan pelbagai transaksi lain, perayu gagal menunjukkan keterangan bahawa transaksi jualan berlaku di Miri dan Kota Kinabalu. Tanpa keterangan sedemikian, adalah munasabah bahawa transaksi jualan berlaku di Labuan.

(3) Selain hujahan tentang 82 deposit tunai, perayu gagal membuktikan bahawa baki wang deposit adalah berkenaan jualan tunai rokok bebas duti. Catatan dalam akaun Labuan hanya menunjukkan pembayaran dari Miri dan Kota Kinabalu. Bahkan, catatan dalam akaun Labuan, tanpa bukti catatan sepadan dalam buku lejar standard, tidak menunjukkan bahawa deposit tunai sebenarnya bagi jualan tunai rokok. Walaupun dengan menganggap 82 deposit tunai dinyatakan sebagai jualan tunai rokok dalam buku lejar standard, ia masih tidak mencukupi untuk membuktikan bahawa rokok dijual di Miri dan Kota Kinabalu dengan tiadanya apa-apa keterangan transaksi jualan sedemikian di kedua-dua lokasi.

(4) Keterangan yang diketengahkan oleh perayu jelas meninggalkan kelompangan serius dalam kes perayu apabila dipertimbangkan berdasarkan keperluan mandatori di bawah s. 56 AMLATFA. Perayu tidak mengemukakan apa-apa keterangan bahawa rokok dibawa dan dijual di Miri dan Kota Kinabalu, iaitu kawasan utama kastam, sebelum boleh dikatakan bahawa duti kastam perlu dibayar menurut s. 155(1)(c) Akta Kastam dan bahawa, kerana tidak berbayar, responden-responden melakukan kesalahan di bawah s. 135(1)(g) Akta Kastam, dan oleh itu kesalahan pengubahan wang haram di bawah s. 4(1) AMLATFA.

(5) Siasatan perayu mengesahkan dakwaan responden-responden bahawa mereka menjual rokok bebas duti di Labuan dan Langkawi. Perayu juga tidak merujuk mana-mana peruntukan dalam Akta Kastam dan peraturan yang digambarkan dibuat atau mana-mana undang-undang, bahawa bagi rokok bebas duti dijual di Labuan harus dibayar di Labuan atau tidak boleh dibayar di Miri dan Kota Kinabalu atau tempat lain. Perayu juga cuba membuktikan bahawa pembayaran tunai yang dibuat oleh satu individu dari Brunei berkenaan dengan penjualan rokok di Miri. Di bawah s. 155(1)(b), duti eksport tidak perlu dibayar untuk rokok yang dieksport dari Labuan ke Brunei. Perayu tidak membuktikan bahawa rokok bebas duti dari Labuan dijual atau diseludup ke kawasan utama kastam dan juga menyangkal bahawa rokok tidak dieksport ke Brunei. Maka, hakim bicara tepat dalam menyimpulkan bahawa rokok dieksport dari Labuan ke Brunei dan dijual di Brunei kerana ia dibayar oleh seseorang dari Brunei dan dengan itu, duti eksport tidak perlu dibayar untuk rokok yang dieksport dari Labuan ke Brunei.

(6) Walaupun perayu cuba menunjukkan bahawa terdapat beberapa deposit tunai dibuat melalui Public Bank di Miri ke dalam akaun Labuan, perayu hanya boleh menunjukkan satu deposit tunai berasal daripada jualan rokok. Tiada keterangan berkenaan deposit lain yang menunjukkan ia berpunca daripada transaksi jualan rokok. Tanpa apa-apa keterangan yang menunjukkan bahawa transaksi jualan rokok berlaku di Miri, deposit itu bukan hasil jualan rokok yang ditransaksikan di Miri. Perayu juga berusaha menyita jumlah yang dirampas dari 23 bank akaun responden ketiga, keempat dan kelima. Walau bagaimanapun, tiada keterangan yang menunjukkan jumlah wang tersebut adalah hasil jualan rokok atau untuk tujuan yang mana perayu mengemukakan fakta berkaitan bayaran.

(7) Jumlah wang RM195,573.67 dalam akaun Labuan yang dipohon untuk disita oleh perayu dirampas menurut perintah di bawah s. 50(1) AMLATFA pada 21 September 2012. Walau bagaimanapun, perayu tidak mengemukakan apa-apa pernyataan atau dokumen bank mahupun apa-apa keterangan untuk membuktikan bahawa jumlah wang itu sememangnya ada dalam akaun Labuan pada 21 September 2012 yang boleh dirampas atau disita. Perayu juga tidak menjelaskan mengapa akaun bank responden kelima dimasukkan dalam perintah dan hubungan antara kedua-dua akaun yang dirampas perayu. Di samping itu, perayu, dalam menyita jumlah wang dalam akaun responden ketiga gagal menjelaskan sama ada terdapat apa-apa hubungan antara akaun Labuan dan akaun responden ketiga kerana kedua-duanya mengandungi jumlah yang sama iaitu RM195,573.67. Penyata bank tidak diekshibitkan untuk membuktikan jumlah dalam kedua-dua akaun bank dan sama ada ia dua jumlah berbeza.

(8) Tiada secebis pun keterangan bahawa responden kedua terlibat dalam jualan rokok bebas duti di luar Labuan atau bahawa dia terlibat dalam kegiatan pengubahan wang haram. Tiada penjelasan mengapa responden kedua dimasukkan dalam permohonan ini. Notis usul tidak menuntut pelucuthakan wang atau akaun banknya. Oleh itu, tiada asas mengapa responden kedua dimasukkan dalam permohonan ini dan permohonan perayu terhadapnya harus dibatalkan.

(9) Dalam menghendaki perayu membuktikan kesalahan pengubahan wang haram dilakukan atau keterangan jualan rokok berlaku di luar Labuan, hakim bicara tidak menggunakan standard pembuktian jenayah. Perayu perlu membuktikan kes mereka atas imbangan kebarangkalian. Standard pembuktian bagi tujuan permohonan di bawah s. 56(1) AMLATFA memerlukan keterangan jualan rokok dalam kawasan utama kastam atau bukti kesalahan di bawah s. 4(1) AMLATFA. Dalam membuktikan kesalahan di bawah s. 4(1), kesalahan predikat di bawah s. 135(1)(g) Akta Kastam harus dibuktikan. Bukti pembayaran dari kawasan utama kastam tidak mencukupi untuk membuktikan kesalahan predikat di bawah s. 135(1)(g) Akta Kastam, dan oleh itu kesalahan di bawah s. 4(1) AMLATFA. Memandangkan kesalahan tidak dibuktikan, penyitaan wang yang dirampas oleh perayu tidak boleh disokong oleh mahkamah.

Legislation referred to:

Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 2(1), 3(1), 4(1)(a), (2), 50(1), 56(1), (4), 61(2), (4), 70(1)

Customs Act 1967, ss. 119, 135(1)(g), 154, 155(1)(a), (b), (c), (d), 158

For the appellant - Anselm Charles Fernandis; DPP
For the respondent - Arthur Lee Chuan Ann; M/s Arthur CA Lee & Partners

[Editor's note: For the High Court judgment, please see PP v. Billion Nova Sdn Bhd & Ors [2015] 1 CLJ 678 (affirmed).]

Reported by S Barathi

JUDGMENT

Idrus Harun JCA:

Introduction

[1] This appeal is directed against the decision of the learned judge of the High Court at Miri delivered on 29 September 2014 dismissing the notice of motion filed by the Public Prosecutor (the appellant) on 18 September 2013. The Notice of Motion sought an order of the learned judge that monies in 24 accounts belonging to the respondents in various banks in Labuan and Miri, seized under s. 50(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (Act 613) (the AMLATFA) be forfeited pursuant to s. 56(1) thereof.

A **Summary Of Facts**

[2] Before we go more closely into the material facts, we would start off by pointing out that there are 24 bank accounts, not 25 as stated by the learned judge in his judgment, from which the appellant sought the order of the learned judge to forfeit the various sums deposited therein. This minor
B error was, in our finding, attributable to the error in para. 1 of the notice of motion wherein after sub-paragraph "(ix)", roman numeral "(x)" was erroneously stated as roman numeral (xi) ending in the result with the wrong sub-paragraph number "(xxv)" being stated therein when it should have been "(xxiv)".

C **[3]** The notice of motion is supported by the following affidavits:

(a) affidavit of Deputy Public Prosecutor Noor Zalizan binti Lazarous affirmed on 18 September 2013 (the first affidavit);

(b) affidavit of the investigating officer Superintendent of Customs Ahmad
D bin Talib affirmed on 18 September 2013 (the second affidavit);

(c) affidavit of the investigating officer Superintendent of Customs Ahmad bin Talib affirmed on 18 September 2013 (the third affidavit);

(d) Afidavit jawapan of Deputy Public Prosecutor Noor Zalizan binti
E Lazarous affirmed on 4 December 2013 (the fourth affidavit);

(e) Afidavit Jawapan of the investigating officer Superintendent of Customs Ahmad bin Talib affirmed on 4 December 2013 (the fifth affidavit);

(f) Afidavit Jawapan TPR II affirmed by Deputy Public Prosecutor Noor
F Zalizan binti Lazarous on 18 February 2014 (the sixth affidavit); and

(g) Afidavit Jawapan (IV) Pegawai Penyiasat affirmed by the investigating officer Superintendent of Customs Ahmad bin Talib on 18 February 2014 (the seventh affidavit).

G **[4]** The respondents filed three affidavits opposing the application *viz*:

(a) Affidavit in opposition affirmed by Toh Kah Ming on 31 October 2013;

(b) Affidavit in reply ii To Affidavit In Reply ii affirmed by Toh Kah Ming on 11 December 2013; and

H (c) Affidavit In Reply ii affirmed by Toh Kah Ming on 11 December 2013.

It is noteworthy that the second deponent of the appellant's affidavits, namely Superintendent of Customs Ahmad bin Talib was the investigating officer of the case involving the respondents in connection with an offence of knowingly concerned in a fraudulent evasion of customs duty under
I s. 135(1)(g) of the Customs Act 1967 (Act 235) which, as the appellant seeks to show in due course, is a predicate offence underlying the money laundering offence under s. 4(1) of the AMLATFA.

[5] On 21 September 2012, the appellant, by order issued pursuant to s. 50(1) of the AMLATFA directed the investigating officer to seize various sums of money amounting to RM1,340,737.10 in the respondents' 24 bank accounts. As can be seen from the first affidavit, the appellant was satisfied that the sums seized were related to an offence of money laundering and more specifically, the offence of engaging in a transaction that involved proceeds of an unlawful activity under s. 4(1)(a) of the AMLATFA, being an activity constituting a serious offence which was an offence under s. 135(1)(g) of Act 235. However, the appellant did not institute any prosecution against the respondents for the said offence of money laundering preferring instead to proceed with the application under s. 56(1) of the AMLATFA seeking the forfeiture of the sums seized under s. 50(1) thereof.

[6] The material facts are clearly set out in the second affidavit to reveal at the outset, the first respondent's business activities of import and export of beers, liquor and cigarettes in Labuan at the material time which, being a duty free zone and by virtue of s. 154 of Act 235, is not in the principal customs area. Under s. 154 of Act 235, the term "principal customs area" means Malaysia with the exclusion of Labuan, Langkawi and Pulau Tioman. Any dutiable goods such as cigarettes while in Labuan are deemed non-dutiable goods by virtue of s. 158 of Act 235. Being as such, the cigarettes are allowed to be sold in Labuan only and can be exported from Labuan. Cigarettes are therefore duty free goods which are accorded with the status "Malaysia Duty Not Paid". Under s. 155(1)(a) and (b) of Act 235, import duty or export duty as the case may be, is not payable upon any goods imported into or exported from Labuan. However where any dutiable goods are transported to the principal customs area from Labuan, import duty shall, pursuant to s. 155(1)(c) be payable. The law treats such transportation of goods as importation into Malaysia. Likewise, if dutiable goods are transported from the principal customs area to Labuan, s. 155(1)(d) requires export duty to be payable. This is because such transportation from the principal customs area to Labuan is treated as export from Malaysia.

[7] The appellant's application for the forfeiture of the sums seized was premised on the allegation that the first respondent sold duty free cigarettes to buyers where the transactions did not occur in Labuan. Such transactions were instead allegedly carried out in Miri and Kota Kinabalu and since no export duty was paid, we were persuaded by the appellant to accept the contention that the first respondent had committed an offence of knowingly concerned in a fraudulent evasion of customs duty under s. 135(1)(g) of Act 235. For these alleged sale transactions, the appellant seeks to prove that payments were made to the first respondent's account in Labuan by way of cash deposits from two locations in Miri and Kota Kinabalu. The first respondent subsequently transferred various sums of money from its account

in Labuan to bank accounts belonging to the second, third, fourth and fifth respondents. In consequence, as the offence under s. 135(1)(g) of Act 235 is specified as a serious offence in the Second Schedule of the AMLATFA, the respondents, were said to have committed an offence of money laundering under s. 4(1)(a) thereof.

Law

[8] The AMLATFA by virtue of s. 2(1) applies *inter alia*, to any serious offence or unlawful activity. The appellant's case is that the sums seized were in connection with an offence under s. 4(1)(a) which reads:

> Offence of money laundering
>
> 4. (1) Any person who:
>
> (a) engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence;
>
> -
>
> -
>
> commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity or instrumentalities of an offence at the time the offence was committed or five million ringgit, whichever is the higher.

To be precise, as the appellant's affidavits have explicitly revealed the offence alleged by the appellant was in connection with the act of engaging in a transaction that involved proceeds of an unlawful activity only, we are not concerned herein with an act of engaging in a transaction that involves "instrumentalities of an offence".

[9] Money laundering is defined in s. 3(1) of the AMLATFA as an offence under s. 4(1) thereof. Under s. 4(1), any person who:

> (a) engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence;
>
> (b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence;
>
> (c) removes from or brings into Malaysia, proceeds of an unlawful activity or instrumentalities of an offence; or
>
> (d) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity or instrumentalities of an offence,

commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity or instrumentalities of an offence at the time the offence was committed or five million ringgit, whichever is the higher.

[10] The act of the respondents would constitute the offence of money laundering if the appellant could show that the respondents were engaged, directly or indirectly, in a transaction that involved proceeds of any unlawful activity where under sub-s. 4(2), it may be inferred from objective factual circumstances that the respondents knew or had reason to believe that the sums seized were proceeds from any unlawful activity, or without reasonable excuse failed to take steps to ascertain whether or not the sums seized were proceeds from any unlawful activity.

[11] The expression 'unlawful activity' is defined in s. 3(1) of the AMLATFA to mean *inter alia* any activity which constitutes any "serious offence", a term also defined in the same section as any of the offences specified in the Second Schedule. In this appeal, the serious offence in question, as earlier-stated, is the offence under s. 135(1)(g) of Act 235, being one of the offences specified in the Second Schedule of the AMLATFA. This is the predicate offence which is the crime underlying the money laundering activity.

[12] Section 56(1) of the AMLATFA under which the application for the forfeiture of the respondents' monies in various bank accounts is made is reproduced herein for easy reference:

Forfeiture of property where there is no prosecution

56. (1) Subject to section 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is:

(a) the subject-matter or evidence relating to the commission of such offence;

(b) terrorist property;

(c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence.

(2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied:

(a) that the property is:

(i) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;

A (ii) terrorist property;

(iii) the proceeds of an unlawful activity; or

(iv) the instrumentalities of an offence; and

(b) that there is no purchaser in good faith for valuable consideration
B in respect of the property.

(3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.

C (4) In determining whether the property is:

(a) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;

(b) terrorist property;

D (c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence,

the court shall apply the standard of proof required in civil proceedings.

This section we apprehend, deals with the power of the Public Prosecutor
E to apply for forfeiture of property in respect of which there is no prosecution for an offence under s. 4(1) and the power of a judge of the High Court to make an order for the forfeiture of such property.

[13] In compliance with ss. 56(1) and 61(2), the learned judge had caused to be published a notice in the gazette calling upon any third party who
F claimed to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property should not be forfeited. However, no third party had come forward to claim the sums seized from the 24 bank accounts. That being the case, s. 61(4) does not apply to this application.

G **[14]** As a prelude to the exercise of the Public Prosecutor's power under s. 56(1), it is plain that the property which is subject to a forfeiture order must be the property seized under the AMLATFA and that there is no prosecution or conviction for an offence under s. 4(1). We are satisfied that these conditions had been fulfilled by the appellant as the monies in various bank
H accounts of the respondents were shown to have been seized by the appellant on 21 September 2012 pursuant to s. 50(1) and that the respondents were not prosecuted for the offence under s. 4(1)(a).

[15] It is additionally the requirement of the section that such application must be made before the expiration of twelve months from the date of the
I seizure of the property in question, or where there is a freezing order (which is not the case herein), twelve months from the date of the freezing, failing

which the property shall be released to the person from whom it was seized. This condition was also fulfilled by the appellant as the application was made on 16 September 2013 while the seizure was executed on 21 September 2012 which was clearly within the time frame specified under s. 56(1).

[16] When these requirements have been met, the Public Prosecutor must next be satisfied that the property is the subject matter of or evidence relating to the commission of the offence under s. 4(1) before he can make the application. To this end, the subjective satisfaction of the Public Prosecutor, must in our view, be based on preponderance of evidence upon which he can act for the purpose of making the application under s. 56(1) that all the facts necessary to secure the forfeiture order are available to be presented and are probably true.

[17] In a similar fashion, the judge to whom the application is made, must also be satisfied, and such satisfaction must be arrived at on the balance of probabilities by virtue of ss. 56(4) and 70(1), that the property is the subject matter or evidence relating to the commission of an offence under s. 4(1). It would therefore be incumbent upon the Public Prosecutor, the appellant in this appeal, applying the standard of proof required in civil proceeding, to prove on the balance of probabilities, the following requisite elements under the AMLATFA and Act 235 for the purpose of seeking a forfeiture order under s. 56(1):

(a) the sums amounting to RM1,340,737.10 seized from the bank accounts of the respondents were the proceeds of the unlawful activity under s. 4(1)(a);

(b) the respondents engaged directly or indirectly, in the transactions that involved these proceeds of unlawful activity; and

(c) since the unlawful activity in the instant case refers to the predicate offence under s. 135(1)(g) of Act 235, the appellant has to prove that the said offence had been committed in that the respondents had transported duty free cigarettes from Labuan to the principal customs area namely Miri and Kota Kinabalu and that import duty thereon was not paid.

If any one of these essential elements is lacking or not established, a forfeiture order can by no means be given.

High Court's Decision

[18] The learned judge in his judgment arrived at the following findings:

(a) the appellant could not show on the balance of probabilities that duty free cigarettes were transported from Labuan into Miri or Kota Kinabalu in contravention of Act 235;

(b) the appellant could not show that these payments for the cigarettes sold and paid into the accounts of the first respondents at Labuan were proceeds from unlawful activities;

A (c) the appellant could not show that these payments into the accounts of the third, fourth and fifth respondents were proceeds from unlawful activities and not payments as dividends;

(d) the appellant did not lead any evidence that the second respondent was involved in selling duty free cigarettes or involved in smuggling of duty free cigarettes or that he was involved in money laundering; and

(e) the appellant had failed to establish on a balance of probabilities that the respondents were involved in money laundering or in unlawful activities or that the proceeds in these bank accounts were the proceeds from unlawful activities or for the purposes of money laundering.

Analysis Of Evidence And Decision

[19] At the heart of the matter lies the core and basic issue for our determination, that is, whether the sums seized were the proceeds of unlawful activities from the sales of 'Malaysia Duty Not Paid' cigarettes allegedly transacted outside Labuan and thus can be forfeited under s. 56(1) of the AMLATFA. This appeal turns upon a question of both fact and law.

[20] Before us, we listened to an interesting argument strongly pressed for the appellant that the sums seized were the proceeds of unlawful activities from the sales of cigarettes outside Labuan though no such evidence of sales outside Labuan was adduced by the appellant. The general tone of the judgment of the learned judge, according to the learned Deputy Public Prosecutor (DPP), appears to require the appellant to prove the case beyond reasonable doubt by adducing direct evidence of the cigarettes sales outside Labuan. In other words, the learned DPP in essence and in substance, sought to impress upon us that, while the appellant wholly relies on circumstantial evidence, to pass the test of subjective satisfaction of the learned judge in order to make a forfeiture sought by the appellant, mere proof of payments made through Public Bank in Miri and Kota Kinabalu to the first respondent's account in Labuan would be sufficient for the judge to draw a conclusion or inference that the sale transactions had taken place outside Labuan and that in consequence, evidence of sales outside Labuan is not necessary.

[21] On the contrary, for the respondents, we were pressed by their learned counsel with the necessity of proving the requisite ingredient of sale transactions outside Labuan before a forfeiture order could be made by the learned judge. Proof of mere payments made to Public Bank in Miri and Kota Kinabalu therefore would not suffice.

[22] The uncontroverted facts in this case would show that the first respondent carried out its business in Labuan while the second to fifth respondents at the material time were its directors and shareholders. For the purpose of carrying out its business, the first respondent purchased the

cigarettes from Lihan Trading Sdn Bhd and Syarikat Jayapuri in Miri. These cigarettes were intended for sale in Labuan and therefore import duty was not payable. In fact, the investigation disclosed the hard and uncontroverted evidence that the first respondent sold duty free cigarettes either in Labuan or by way of a transfer using Form Custom 8 to a company by the name of Orion Nova in Langkawi, which at the time in question was another duty free zone. Orion Nova was owned by the first respondent.

[23] Notwithstanding the above finding however, the appellant seeks to show that the first respondent's statements of account in respect of its account with Public Bank No. 3-0659180-25 in Labuan as exhibited in Exhibit AT-2 (the Labuan account) would reveal that between the period from 2009 to 2011 there were 82 payments made into the Labuan account by way of cash deposits from two locations in the principal customs area namely Miri, Sarawak and Kota Kinabalu, Sabah amounting to RM2,675,090 of which:

(a) 81 payments were made to the Labuan account through Public Bank branch at China Street, Miri; and

(b) 1 payment was made to the Labuan account through Public Bank branch at Lido, Kota Kinabalu.

[24] The appellant, in the wake of this discovery, alleged that these 82 cash deposits were in connection with the sales of duty free cigarettes outside Labuan. As these duty free cigarettes were transported to and sold at the two locations in the principal customs area, import duty was payable. The learned DPP contended that the transportation and sale transactions of the cigarettes were caught by s. 155(1)(c) of Act 235 to all intents as if such transportation were importation into Malaysia and since the respondents did not pay the said import duty on these cigarettes, they had consequently committed an offence under s. 135(1)(g) of Act 235.

[25] We can clearly discern from the general tenor of the above contention and the affidavits of the appellant that the basis of the appellant's application is the evidence of cash deposits in the Labuan account made through Miri and Kota Kinabalu only and nothing else. A pertinent question has arisen in consequence of this argument which is whether an inference can conclusively be made from the evidence of these payments, without more, that these cigarettes were in fact transported to and sold in the principal customs area. The appellant's finding as asserted in the affidavits had brought a cutting rejoinder from the respondents that the deposits in Miri and Kinabalu merely showed that the monies for the cigarettes purchased in Labuan were deposited from these two places but did not show that these cigarettes were sold outside Labuan stressing that the sales of cigarettes were in fact transacted in Labuan.

[26] In fact, in the face of the above evidence, the respondents' affidavit in opposition which was affirmed by Toh Kah Ming, the manager of the first respondent vehemently denied that they sold cigarettes outside Labuan. They instead asserted that the cigarettes were at all times sold in Labuan and Langkawi adding that the cash deposits were made through Public Bank in Miri and Kota Kinabalu, by some customers of the first respondent who purchased the cigarettes from Labuan, but banked in the monies owed to the first respondent through Public Bank in Miri and Kota Kinabalu. These cash deposits merely showed that the monies for the goods purchased in Labuan were deposited from these places but did not show that these goods were sold outside Labuan. The appellant, according to the respondents, failed to investigate whether the cigarettes sales occurred in Labuan or not stressing that these sales were in fact transacted in Labuan. As regards receipt vouchers which merely stated "cash sales", the respondents explained that it was the first respondent's norm to state 'cash sales' on its receipt vouchers but stressing yet again that this was not proof that the sales occurred outside Labuan.

[27] The basis for this assertion by the appellant was a comparison of 20 of these cash deposits out of the 82 payments, with the cash deposit slips obtained from Public Bank in Miri (exhs. "AT-3(a)" to "AT-3(o)"), which revealed the payments of the cash deposits being made at Public Bank in Miri. Following the above investigation, it had therefore become necessary for the investigating officer to scrutinize the first respondent's standard ledger book records for the periods between 1 July 2009 to 30 June 2010 and 1 July 2010 to 30 June 2011 which were used to record the entries of monies into the Labuan account (exhs. AT-4(a) and AT-4(b)). It was found that 16 cash deposits (exhs. "AT-4(a)(i)" to "AT-4(a)(v)") out of these 82 cash deposits, were recorded as cash sales for cigarettes in the first respondent's standard ledger book. However there was no information relating to the purchasers of these cigarettes as their names were not stated on the voucher receipts issued by the first respondent (exh. "AT-5"). The combined and cumulative effect of the above evidence, the investigating officer said, proved that the first respondent had exported or sold duty free cigarettes through cash sales to unknown buyers in the principal customs area. This is the circumstantial evidence upon which the appellant relies in proving that the offence under s. 4(1) of the AMLATFA had been committed. We are mindful however, that the appellant had also stated in the second affidavit that the first respondent only sold duty free cigarettes in Labuan and Langkawi, the evidence which clearly contradicts this allegation of sale transactions occurring in the principal customs area.

[28] The appellant in the fifth affidavit deposed by the investigating officer sought to disclose 45 cash transactions in relation to cigarettes amounting to RM722,190 (exh. "AT-4(a)") as proof of proceeds from the cigarette sales which the appellant surmised had taken place in Miri. Exhibit "AT-4(a)

consists of 198 pages of the first respondent's trial balance as at 30 June 2010, balance sheet as at 30 June 2010 and standard ledger book. While these documentary exhibits merely show cigarette sales apart from describing numerous other transactions, we find that the appellant failed to show evidence that these sale transactions occurred in Miri and Kota Kinabalu. In the absence of such evidence, it could reasonably be inferred that these sale transactions had taken place in Labuan.

[29] It is significant to note that the investigating officer made no mention in the second affidavit nor any other affidavits, whether the remaining 66 cash deposits were recorded as cash sales for cigarettes. It could therefore safely be assumed that the investigating officer had only counter-checked 16 cash deposits (exhs. "AT-4(a)(i)" to "AT-4(a)(v)") against the first respondent's standard ledger book records (exhs. "AT-4(a)" - "AT-4(b)") for the period between 1 July 2009 to 30 June 2010 and 1 July 2010 to 30 June 2011 which recorded the entries of monies in respect of all cash sales of duty free cigarettes during these periods. Since no similar comparisons and counter-checking were carried out by the appellant in respect of the remaining 66 cash deposits with the relevant entries (if any), in the standard ledger book, the appellant in consequence failed to show with pinpoint accuracy in the exhibits which they had produced, all in all more than 1,300 pages of standard ledger book records, trial balances, balance sheets, cheques and voucher receipts, where these cash deposits could be identified or appear in these documents to show that the deposits were in fact in respect of the cash sales of duty free cigarettes.

[30] Thus, save for their mere averment in the affidavits on the 82 cash deposits amounting to RM2,675,090, the appellant failed to prove that the remaining cash deposits were actually in respect of the cash sales of duty free cigarettes. The entries in the Labuan account merely indicate payments from Miri and Kota Kinabalu. Standing on its own, these entries in the Labuan account, without proof of corresponding entries in the standard ledger book, do not show that the cash deposits were indeed in respect of the cash sales for cigarettes. We are in no position to identify which entries in these documentary exhibits are in respect of the 82 cash deposits stated in the second affidavit save for the 16 cash deposits earlier-mentioned. It would not be sufficient for the appellant to persuade the court to accept these sums with the argument urged on its behalf that we should draw a conclusion that these were cash deposits in respect of cash sales of duty free cigarettes outside Labuan when there was a serious and glaring omission on their part to show the court these relevant entries. In any event, even assuming that all the 82 cash deposits were stated as cash sales for cigarettes in the standard ledger book, this is still insufficient to prove that the cigarettes were sold in Miri and Kota Kinabalu in the absence of any evidence of such sale transactions in both locations. If there is no such evidence, then surely the appellant could

not expect the court to hazard a guess that these sums were in fact the proceeds of the respondents' unlawful activity for this in our view would tantamount to sheer speculation.

[31] We are mindful that the appellant had to prove pursuant to s. 56 of the AMLATFA that the money which was sought to be forfeited was the subject matter or evidence relating to the commission of the offence under s. 4(1) thereof. The words 'the commission of such offence' appearing in s. 56(1) presuppose that an offence has been committed. But what the appellant had produced before the learned judge was merely the evidence relating to the cash deposits in Public Bank in Miri and Kota Kinabalu and cash sales of duty free cigarettes. This evidence, the learned DPP submitted was sufficient as the appellant only needed to show that there was a link between the sums seized for the predicate offence and the AMLATFA case in order to satisfy the judge that the requirements under s. 56 had been fulfilled before a forfeiture order could be made. It might be apposite to be reminded on what this contention entails in the context of evidential burden placed on the appellant under s. 56 in that the appellant in consequence is not required to show any proof of sale transactions of the cigarettes occurring in the principal customs area and that the circumstantial evidence of mere payments outside Labuan is sufficient to order for the forfeiture of the property in question.

[32] The evidence led by the appellant in our judgment, has clearly left a serious gap in the appellant's case when considered in light of the mandatory requirements under s. 56 of the AMLATFA which we have deliberated upon earlier. The appellant in fact did not adduce any evidence that these cigarettes were transported and sold in Miri and Kota Kinabalu, being in the principal customs area, before it could be said that customs duty was payable by virtue of s. 155(1)(c) of Act 235 and that, as it had not been paid, the respondents had committed the offence under s. 135(1)(g) of Act 235 hence the offence of money laundering under s. 4(1) of the AMLATFA. Neither did the appellant lead any evidence that the 82 payments made into the Labuan account were proceeds from the sales of duty free cigarettes transported from Labuan and delivered in Miri and Kota Kinabalu.

[33] It would also be pertinent to mention that while the appellant contended that the first respondent had sold these cigarettes outside Labuan, there was however no allegation that the second, third, fourth and fifth respondents had sold cigarettes outside Labuan. We would venture to say that the reason why they have been included in this application is probably due to the fact that since there were transfers of monies by the first respondent to the second, third, fourth and fifth respondents, the monies in their accounts have become absolutely necessary to, and must logically, be forfeited as well. The respondents on the other hand claimed that these cigarettes were sold in Labuan and Langkawi with some of these sale transactions, the payments owed by the purchasers were made from Miri and

Kota Kinabalu. The appellant, it is to be noted, could not and did not rebut the respondents' line of defence. Instead, the appellant's investigation confirmed the respondent's assertion that they sold duty free cigarettes in Labuan and Langkawi. The appellant, as rightly found by the learned judge, did not refer to any provisions in Act 235 and regulations made thereunder or any other law that duty free cigarettes sold in Labuan must be paid in Labuan or could not be paid in Miri and Kota Kinabalu or elsewhere.

[34] It would be appropriate to mention at this juncture that the appellant sought to prove that the cash payment of RM68,800 (exh. "AT-3(i)") allegedly made by one individual from Brunei was also in respect of the cigarettes sale in Miri. The depositor was Toh Kah Tiong, the brother of Toh Kah Ming. The facts gleaned from the second affidavit of the investigating officer showed that the payment was made in Miri by Toh Kah Tiong who received the money from the individual from Brunei being payment for the sales of cigarettes. The appellant's fifth affidavit stated that this payment was deposited in Miri on 1 October 2013. Toh Kah Tiong however did not know where the sales were carried out as he was not involved in the business of the first respondent. It was Toh Kah Ming who instructed him to deposit the money into the Labuan account through Public Bank in Miri.

[35] In our view the payment could not have been made on 1 October 2013 as exh. 'AT-3(i)' clearly showed that the sum was deposited on 1 October 2010. In any event, the notice of motion was filed on 16 September 2013. However that admittedly, is not a significant issue as it could probably be due to a typographical error. The real issue for our determination is that, if the Brunei individual was the buyer, could it possibly mean that an inference could be made that the cigarettes were exported from Labuan to Brunei. If that was indeed the case, there was no offence committed, as this was exportation of the cigarettes from Labuan to Brunei which under s. 155(1)(b), export duty should not be payable. The appellant did not address this issue. We agree with the learned judge that the appellant did not establish that the duty free cigarettes from Labuan was sold in or smuggled to the principle customs area neither was it disproved that the cigarettes were not exported to Brunei. Accordingly, the learned judge correctly drew an inference that the cigarettes were exported from Labuan to Brunei and sold in Brunei because it was paid for by a person from Brunei and that accordingly export duty was not payable upon the cigarettes exported from Labuan to Brunei.

[36] From the Labuan account the first respondent had transferred the following sums:

(a) RM152,580 to the third respondent's account in five payments:

(i) RM27,760 on 30 December 2010;

(ii) RM27,760 on 21 October 2010;

(iii) RM27,760 on 4 October 2010;

(iv) RM27,760 on 23 March 2010;

(v) RM41,640 on 14 September 2010;

(b) RM366,630 to the fourth respondent's account in five payments:

(i) RM66,660 on 3 January 2011;

(ii) RM66,660 on 21 October 2011;

(iii) RM66,660 on 4 February 2010;

(iv) RM66,660 on 29 March 2010;

(v) RM99,990 on 17 September 2010; and

(c) RM174,980 to the fifth respondent's account in four payments:

(i) RM77,820 on 5 February 2010;

(ii) RM27,760 on 23 March 2010;

(iii) RM41,640 on 14 September 2010;

(iv) RM27,760 on 29 December 2010;

These payment transfers were set out in the appellant's second affidavit.

[37] The respondents in their affidavit in opposition explained that these sums were payments of dividends by the first respondent to the third, fourth and fifth respondents. Interestingly enough, the appellant in the fifth affidavit did not dispute this explanation, it had instead admitted it. There is therefore no evidence to show that the sums were the proceeds of unlawful activity. In fact, it is not the appellant's case that these transfers were made from the 82 cash payments deposited into the Labuan account.

[38] The appellant in the second affidavit had also sought to show that there were several other cash deposits made through Public Bank in Miri into the Labuan account in January and October 2010 as follows:

(a) RM121,115 comprising three payments:

(i) RM32,750 on 11 January 2010;

(ii) RM56,590 on 11 January 2010

(iii) RM31,775 on 4 January 2010; and

(b) RM144,260 comprising four payments:

(i) RM27,840 on 1 October 2010;

(ii) RM68,800 on 1 October 2010;

(iii) RM21,900 on 19 October 2010;

(iv) RM25,720 on 29 October 2010.

The respondents in their affidavit in opposition explained that these payment were advances made by the directors to the first respondent.

[39] During the same period, the first respondent made two payments of RM172,240 and RM133,340 to the second, third and fifth respondents which according to the respondents, were dividends paid by the first respondent to the second, third, fourth and fifth respondents.

[40] In rebutting the respondents' explanation, the appellant in the fifth and seventh affidavits stated that exh. "AT-5" showed that the sum of RM56,590 which was paid into the Labuan account on 11 January 2010 was in fact the proceeds of sales of duty free cigarettes and the payment was made to the Labuan account through Public Bank in Miri. Clearly the appellant could only show one cash deposit which came from the cigarette sales. There was no evidence as regards the other six deposits that would indicate that it came from cigarette sale transactions. In any event, the fact that the sum of RM56,590 was deposited in Miri, in the absence of any evidence to show that the cigarette sale transactions occurred in Miri, we are not satisfied that the deposit was the proceeds of cigarette sales which were transacted in Miri. Accordingly, in our judgment, the appellant failed to establish that the two sums of RM121,115 and RM144,260 paid into the Labuan account and the sums of RM172,240 and RM133,340 paid by the first respondent to the second, third, fourth and fifth respondents were the proceeds of sales of duty free cigarettes which occurred outside Labuan.

[41] In prayers 1(iii) to (xxv), the appellant sought to forfeit the sums seized from the 23 bank accounts of the third, fourth and fifth respondents. Toh Kah Ming in her affidavits had explained that these were dividend payments to these respondents who were the shareholders and directors of the first respondent. The balance sheet of the first respondent as at 30 June 2010 showed that the revenue for the year amounted to RM10,268,112.60 including cash sales of cigarettes, sundry and wine of RM8,124,963.40, the accumulated profit of RM2,966,884.61 of which RM1,100,000 was paid out as dividends to the shareholders (exh. "AT-4(b)" of the second affidavit). In addition, the balance sheet of the first respondent as at 30 June 2011 disclosed the revenue for the year of RM6,900,152.35, the retained profits of RM3,420,619.42 of which RM1,600,000 was paid out as dividends to the shareholders (exh. "AT-4(b)" of the second affidavit). The learned judge correctly pointed out that these documents were produced by the appellant and would explain the several payments made into the bank accounts of these respondent. The appellant did not adduce any evidence to the contrary.

[42] There were eight cash payments made by the first respondent by way of cheques in 2010 (see exhs. "AT-10(1)" to "AT-10(4)" of the second affidavit). The first respondent had also paid by a cheque in the sum of RM500,000 into the Labuan account on 6 October 2009. We however find no evidence which the court can accept with some measure of certainty and comfort that would show that these sums were the proceeds of sales of cigarettes, or from which the court can say clearly the purpose for which the

appellant adduced these facts relating to these payments. If it was for the purpose of showing that these were the cash deposits from the sales of duty free cigarettes outside Labuan which the first respondent subsequently paid to the second, third, fourth and fifth respondents, such evidence was clearly lacking. There was absolutely no evidence to that effect. The purpose for which these documents were produced, in our judgment lack clarity and we must say that the appellant seemed to have gone in a blur when it exhibited these documents to the second and third affidavits.

[43] We now turn to prayer 1(i) of the notice of motion which relates to the appellant's application to forfeit the sum of RM195,573.67 in the Labuan account. The learned judge found that the sum was seized by the investigating officer pursuant to the Public Prosecutor's order issued under s. 50(1) of the AMLATFA on 21 September 2012 (exh. "AT-1" annexed to the appellant's third affidavit). This exhibit referred to the Labuan account and the fifth respondent's bank account No. 1-2067980-14 at Public Bank but did not state or refer to the sum of RM195,573.67 or any sum to be seized.

[44] The learned judge found that the appellant did not exhibit any bank statement or document nor produce any evidence to establish that this sum was in fact in the Labuan account as at 21 September 2012 which could be seized or could be forfeited. The appellant moreover did not explain why was the fifth respondent's bank account included in the order and the connection between the two accounts which the appellant had seized pursuant to the order in exh. "AT-1".

[45] In prayer (iii) of the notice of motion, the appellant sought to forfeit the sum of RM195,573.67 from the third respondent's account no. 37560035192 at Hong Leong Islamic Bank. The appellant, it is to be noted, failed to explain whether there was any connection between the Labuan account and the third respondent's bank account because both accounts, as the learned judge correctly pointed out, purportedly contained exactly the same sum of RM195,573.67. No bank statements were exhibited to establish that this sum was in these two bank accounts and whether it was two different sums. The appellant's affidavits make no mention of this sum as well as the sum in prayer 1(ii) and do not provide any reason as to why the same should be forfeited.

[46] The learned judge dealt with the Public Prosecutor's orders in exhibits marked as exh. 'AT-1' to 'AT-8' annexed to the second affidavit and found that these orders merely referred to the bank accounts to be seized without setting out the monies or sums which were referred to in the affidavit and whether these sums were in fact in these bank accounts. We agree with the learned judge's conclusion that as the investigating officer did not exhibit nor produce any bank statements or documents to establish that these sums were in the 23 bank accounts belonging to the third, fourth and fifth respondents

and which could be seized as at 21 September 2012 or which could be forfeited in this application, there was no basis for the investigating officer and the appellant to justify the seizure or forfeiture. If we may add, it would seem clear that s. 50(1) of the AMLATFA requires the Public Prosecutor to specify in the order the property or any accretion to it in the financial institution. The orders in exhs. "AT-1" to 'AT-8" did not specify the property or accretion to it to be seized.

[47] There is one question that is persistently coming to our mind. It is to be noted that the appellant did not seize any bank account belonging to Toh Yew Sing @ Ah Zik the second respondent in this appeal. His name is conspicuously omitted from the Public Prosecutor's orders set out in Exhibits 'AT-1' to 'AT-8' annexed to the second affidavit. Yet, the appellant in the third affidavit alleged that a sum of RM350,190 was transferred to his account. There was not an iota of evidence that the second respondent was involved in selling duty free cigarettes outside Labuan or that he was involved in money laundering activity. There is no explanation why the second respondent was included in this application. The notice of motion does not seek the forfeiture of his money or bank account. We are in complete agreement with the learned judge that there was absolutely no basis for the second respondent to be included in this application and that the appellant's application against him ought to be struck out.

[48] It is significant to mention that perusal of the first respondent's bank statement (exh. "AT-2") revealed that the same contained deposits not only those which were deposited from Miri and Kota Kinabalu, but also deposits which were made directly to the Labuan account both from cigarette sale and other transactions. The statement showed deposits either by cheques or cash other than the deposits made in Miri and Kota Kinabalu. We could assume that these were the deposits which came from other legitimate sources, not the subject matter of the forfeiture application. Accordingly the deposits which were made in Miri and Kota Kinabalu had commingled with the other deposits. Thus when the payments were made by the first respondent to the other four respondents, the money could have come from both sources. The appellant had to ensure that this would not happen assuming that they could prove the commission of the offence under s. 4(1). Needless to say that s. 56(1) allows only any property the subject matter or evidence relating to the commission of the offence under s. 4(1) to be forfeited.

[49] It was submitted that the learned judge in making his decision had raised the standard of proof required in civil proceedings to proof beyond reasonable doubt. With respect, we do not think that by requiring the appellant to prove the money laundering offence had been committed or the evidence of cigarette sales occurring outside Labuan, the learned judge had in effect applied the criminal standard of proof. We would like to emphasise in this regard, that the appellant had to prove their case on a balance of

probabilities. Such standard of proof, for the purpose of the application under s. 56(1) in this appeal, requires evidence of sales of these cigarettes in the principal customs area, or the offence under s. 4(1) to be proved before the judge could be persuaded to find with any measure of certainty the sums seized from these 24 accounts were the subject matter or evidence relating to the said offence. The judge to whom an application is made under s. 56(1) shall only make a forfeiture order of the monies if he is satisfied that the above conditions are fulfilled. Obviously therefore, the law requires the offence must be proved in order for the judge to make the forfeiture order.

[50] In our judgment, to prove the offence under s. 4(1) of the AMLATFA, the predicate offence under s. 135(1)(g) of Act 235 must first be proved. Mere proof of payments from the principal customs area without more, is not sufficient to prove the predicate offence under s. 135(1)(g) of Act 235, hence the offence under s. 4(1) of the AMLATFA. We agree with the learned judge that in the modern business world, payments could be made or banked in from any bank account or any part of the world for sales, transactions or purchases made elsewhere, at the convenience or choice of the payer and payee. We need only say on this aspect that it will not be a far-fetched conclusion to put in a nutshell that there could not be proceeds of an unlawful activity where such unlawful activity has not been proven. There is not the slightest room for doubt that the appellant failed to prove that these cash deposits were proceeds of the offence of money laundering under s. 4(1). The learned judge correctly decided that these cash deposits were not sufficient to prove the offence, the appellant would have to prove that the duty free cigarettes were in fact sold in Miri and Kota Kinabalu before an order of forfeiture in respect of the various sums in the 24 bank accounts could be made. We are driven to the inevitable conclusion that since the offence was not proved, this court would not countenance the forfeiture of the money seized by the appellant. The learned DPP had contended that s. 119 of Act 235 would apply. We agree with the learned judge that the presumption in s. 119 of Act 235 does not apply to a forfeiture proceedings under the AMLATFA. The presumption under s. 119 of Act 235 only applies for the cause of forfeiture under the said Act. The forfeiture application in this appeal it must be stressed is under s. 56 of the AMLATFA.

Conclusion

[51] We would say in conclusion that it should be assumed that the court hearing the application had no knowledge about the facts surrounding the case. It was for each party to present the evidence. At the end of the proceedings, applying the civil burden of proof which is on the balance of probabilities, the winner would be the party that has successfully tipped the scale in its favour. It is incumbent on the appellant to show a preponderance of evidence that all facts necessary to prove their case are presented and are

probably true. The appellant needs only to prove their case which is more probable than the respondent. The evidence to which we have alluded to, standing on its own, is insufficient to support a conclusion that the monies in question are the proceeds of an unlawful activity which constitutes a money laundering offence under s. 4(1) of the AMLATFA. The appellant, we find, has failed to prove the case on the balance of probabilities to the level that we can safely say that we are satisfied that all the essential requirements in s. 56(1) of the AMLATFA have been established. We are satisfied that, the learned judge in dismissing the application, did not misdirect himself on law and fact. Based on the foregoing reasons and in all the circumstances, the scale of justice points to the inevitable conclusion that the appellant's application must fail. We therefore dismiss the appeal and affirm the decision of the learned High Court Judge. There is no order as to costs.

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